In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1256

HARTLE M. BOWNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on three counts of willfully attempting to evade large parts of his income tax liability during the years 1964 through 1967 by filing false and fraudulent income tax returns, in violation of 26 U.S.C. 7201. He was sentenced to 18 months' imprisonment, with 15 months suspended, placed on probation for three years, fined $9,000, and required to pay the costs of prosecution. The court of appeals affirmed (Pet. App. A 14-16).

Petitioner contends (Pet. 7) that the trial court erred in refusing to instruct the jury that it might find him guilty of the lesser included offense of filing a false return, in violation of 26 U.S.C. 7207. But such an instruction is inapplicable to the facts of this case. The only falsity charged in the indictment was that the tax

returns understated his true income and tax liability. If the jury found this falsity to have been proved (*i.e.*, if it accepted the government's reconstruction of what it claimed to be petitioner's true income) and further found the element of willfulness, petitioner was guilty of violating both 26 U.S.C. 7201 and 26 U.S.C. 7207, since the false statement constituted an attempt to evade or defeat the tax because it had the requisite effect of reducing the stated tax liability. On the other hand, if the jury did not accept the government's reconstruction, or did not find the element of willfulness, petitioner was guilty of neither offense. While the two provisions covered the same conduct, there was no basis in the evidence under which the jury could acquit of the greater (charged) offense and convict of the lesser (included) offense. Accordingly, the trial court correctly refused to so instruct the jury. See, *e.g.*, *United States* v. *Bishop*, 412 U.S. 346, 361; *Sansone* v. *United States*, 380 U.S. 343, 350-353; *Berra* v. *United States*, 351 U.S. 131, 134-135; *Sparf and Hansen* v. *United States*, 156 U.S. 51, 63; *Stevenson* v. *United States*, 162 U.S. 313, 314-316, 321-323.

Contrary to petitioner's further argument (Pet. 9), the decision below does not conflict with *United States* v. *Coppola*, 425 F.2d 660 (C.A. 2). There, the defendant pled guilty to income tax evasion, in violation of 26 U.S.C. 7201. On appeal, he challenged the constitutionality of that statute on the ground that it covered exactly the same ground as Sections 7203 and 7207, and was thereby void for vagueness. Although the court agreed that proof of the charges contained in the indictment would establish not only a violation of Section 7201 but also of Sections 7203 and 7207, it noted that the contention merely established that Sections 7203 and 7207 are lesser included offenses and not that Section

7201 was unconstitutional. However, the court did not hold that every Section 7201 charge required a lesser included offense instruction for Section 7207. As this Court held in *Sansone*, such a lesser included offense instruction is only required when the jury could rationally acquit the defendant of the greater offense and convict him of the lesser.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[1] *Escobar* v. *United States*, 388 F.2d 661 (C.A. 5), certiorari denied, 390 U.S. 1024, cited by petitioner (Pet. 10-12), is not to the contrary. The portions of the court's opinion in that case quoted by petitioner are in accord with the rule of *Sansone* that a lesser included offense instruction is appropriate where the charged greater offense requires the jury to find a disputed fact that is not required for conviction of the lesser included offense.